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11 **AFSCME LOCAL 101**

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF SANTA CLARA**
14 **AT SAN JOSÉ**

15 **SAN JOSE POLICE OFFICERS'**
16 **ASSOCIATION,**

17 Plaintiff,

18 v.

19 **CITY OF SAN JOSÉ, BOARD OF**
20 **ADMINISTRATION FOR POLICE AND FIRE**
21 **DEPARTMENT RETIREMENT PLAN OF**
22 **CITY OF SAN JOSE, and DOES 1-10,**
23 **inclusive,**

24 Defendants.

Consolidated Case No. 1-12-CV-225926

[Consolidated with Case Nos. 1-12-CV-225928,
1-12-CV-226570, 1-12-CV-226574,
1-12-CV-227864, and 1-12-CV-233660]

ASSIGNED FOR ALL PURPOSES TO:
JUDGE PATRICIA LUCAS
DEPARTMENT 2

**AFSCME LOCAL 101'S OPPOSITION TO
CITY OF SAN JOSE'S SUPPLEMENTAL
MOTION IN LIMINE TO EXCLUDE
AFSCME WITNESSES CAROL GARCIA
AND PEGGY HORNING FROM
TESTIFYING AT TRIAL**

Hearing Date: July 19, 2013
Hearing Time: 9:00 a.m.
Courtroom: 2
Judge: Hon. Patricia Lucas
Complaint Filed: July 5, 2012
Trial Date: June 22, 2013

25 **AND RELATED CROSS-COMPLAINT AND**
26 **CONSOLIDATED ACTIONS**

1 **I. INTRODUCTION**

2 Through its Motion in Limine ("Motion"), the City of San José ("City") moves to exclude
3 proposed trial witnesses Carol Garcia and Peggy Horning ("witnesses") from testifying at trial
4 because, according to the City, "AFSCME has refused to timely produce them for deposition."

5 First, the City's Motion should be rejected because it is untimely pursuant to the terms of the
6 Court's April 23, 2013 Order ("Order"), as reaffirmed in the parties' "Stipulation and [Proposed]
7 Order Regarding Schedules for Motions in Limine Relating to Expert Witnesses," filed with the
8 Court around June 27, 2013 ("Supplemental Stipulation").

9 Furthermore, the City cites to two inapplicable cases to support its argument, *Thoren v.*
10 *Johnston & Washer* (1972) 29 Cal.App.3d 270 and *Deeter v. Angus* (1986) 179 Cal.App.3d 241, and
11 misrepresents these narrow holdings. Rather, the City's motion is contrary to law. (See *Saxena v.*
12 *Goffney* (2008) 159 Cal.App.4th 316.) The City is simply not entitled to the evidence sanction of
13 precluding a witness from testifying based on asserted dissatisfaction with the dates on which the
14 witnesses are available for deposition. The City has failed to provide any proper authority to support
15 the extreme sanctions sought through this Motion.

16 The City also argues that AFSCME Local 101's ("AFSCME") proposed trial witnesses
17 should be excluded from testifying at trial because "AFSCME's refusal to timely produce Ms. Garcia
18 and Ms. Horning violates this Court's April 23, 2013 Order...." This argument is equally unavailing,
19 as the aforementioned Court Order ("Order") only requires that the witnesses be made available for
20 deposition when requested, and AFSCME has offered to do so. The fact that the City is not agreeable
21 to the options presented for deposition does not characterize AFSCME's actions as a "refusal."
22 Therefore, this Motion should be denied in whole.

23 Finally, the City can show no prejudice for its decision not to depose these witnesses within
24 the timeframe they are available, because AFSCME has provided to the City the pre-trial declarations
25 of the witnesses' proffered testimony, as contemplated and set forth in the Pre-Trial Order (and upon
26 which they may be cross-examined at trial). The City has not indicated its willingness to permit the
27 declarations to be used in lieu of testimony at trial, and it now seeks to unfairly and prejudicially
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1 exclude the testimony.

2 For these reasons, as more fully described below, the motion should be denied.

3 **II. ARGUMENT**

4 **A. *The Motion is Untimely***

5 The Order specifies that by June 27, 2013, all motions in limine ("MIL") were to be filed and
6 served.¹ The Supplemental Stipulation, adjusted the dates for filing motions in limine with respect to
7 expert witness testimony; specifically stated that the "deadlines for motions *in limine* unrelated to
8 expert witness testimony shall remain the same as those specified in the April 24, 2013 [Order]." (Soroushian Decl., ¶ 8, Exh. 4.) The City signed the Supplemental Stipulation on June 26, 2013, *a*
9 *day prior to the aforementioned June 27th deadline.*

10
11 Both witnesses subject to this Motion are lay witnesses. As the City acknowledges in page 1
12 of its Motion, the City was informed that AFSCME intends to call the witnesses to testify at trial on
13 Thursday, June 20, 2013, an entire week before the MIL deadline. In addition, declarations of the
14 witnesses' proffered testimony were served on the City at that time. Knowing this, the City waited
15 four days to notice the depositions of these witnesses *without first consulting with* AFSCME's
16 counsel ("counsel") with respect to counsel's availability or that of the witnesses.

17 Had the City immediately attempted to meet and confer with counsel with respect to counsel's
18 availability and that of the witnesses, several things would have happened:

- 19 1) The City would have learned of counsel's and Ms. Horning's limited availability in advance
20 and
21 2) The City would have learned of Ms. Garcia's lengthy period of unavailability and could have
22 noticed her deposition prior to June 28--given the fact that it learned of AFSCME's intent to
23 call her as a witness eight days prior to her planned departure.

24 At that time, if the City was still unable to secure mutually agreeable deposition dates for the
25 witnesses, it could have either:
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28 ¹ A copy of this Order constitutes Exhibit A of the Declaration of Michael C. Hughes' in support of the City's Motion.
The relevant language is found on lines 16-17 of page 4.

- 1 1) Asked for a stipulation to extend the time to file such a motion--the Supplemental Stipulation
- 2 is an example of how that has already occurred in this case,
- 3 2) Sought leave of Court to file motions in limine beyond the June 27th deadline had the parties
- 4 not agreed to such a stipulation, which would have been unlikely, or
- 5 3) Had enough time to file this instant Motion by the June 27th deadline.

6 AFSCME should not be faulted because the City failed to consult with it before noticing
7 these depositions and failed to comply with the mutually agreed upon deadlines set forth in the
8 Order and Supplemental Stipulation; therefore, this Motion should be denied.

9 B. *The City Misrepresents the Holdings in the Cases it Cites and the Cases Are Inapposite*

10 The City cites to two cases to support its argument, *Thoren v. Johnston & Washer* (1972) 29
11 Cal.App.3d 270 and *Deeter v. Angus* (1986) 179 Cal.App.3d 241, but does not correctly describe the
12 narrow holdings of these cases. The City's Motion is contrary to law. (See *Saxena v. Goffney* (2008)
13 159 Cal.App.4th 316.) The City is simply not entitled to the evidence sanction of precluding a
14 witness from testifying based on an asserted dissatisfaction with the availability for deposition of said
15 witnesses.

16 In *Thoren* and *Deeter*, the appellate courts upheld the trial court's exclusion of evidence based
17 on a finding that a party *willfully concealed* its existence in response to interrogatories. (See *Thoren*,
18 29 Cal.App.3d at 274-275, *Deeter*, 179 Cal.App.3d at 254.) In *Thoren*, in response to an interrogatory
19 seeking the identification of witnesses who observed the scene of the injury, the party knowingly
20 failed to identify a witness and identified that witness for the first time in its opening statement at trial
21 after a jury had been empaneled.² Importantly, in both cases, the opposing party was unaware of the
22 existence of the concealed evidence and, therefore, could not seek to compel it. The *Thoren* court
23 explained that excluding the evidence in that case was warranted because "a willfully false response
24 ... subjects the adversary to unfair surprise at trial." (*Id.* at 274.) The City erroneously asserts that
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27 ² In *Deeter*, the party failed to produce in response to a request for production and concealed in
28 response to an interrogatory the existence of a tape that it sought to introduce at trial. *Deeter* simply
does not address the issue of exclusion of a witness from trial.

1 these cases hold that “[i]f information is requested in discovery and not provided, that information
2 cannot be offered into evidence at trial.” (Motion, p. 1.) This is not the holding of *Thoren* nor *Deeter*.

3 In *Saxena v. Goffney*, the court explained that the *Thoren* holding is “narrow” and “covering a
4 circumstance not specifically dealt with in the Civil Discovery Act.” (159 Cal.App.4th at p. 334.) The
5 exclusionary remedy in the *Thoren* case is limited to situations where a party willfully and falsely
6 conceals a witness’s name in response to discovery and, thereby, subjects the adversary to unfair
7 surprise. (*Saxena*, 159 Cal.App.4th at p. 332 (citations omitted); see also *Biles v. Exxon Mobil Corp.*
8 (2004) 124 Cal. App. 4th 1315, 1325 (overturning exclusion of a witness who was not identified in
9 discovery responses and reasoning that, “*Thoren* provides authority for excluding evidence based on
10 a willfully false discovery response.”).

11 Here AFSCME properly disclosed the witnesses, and even provided a declaration of their
12 anticipated testimony, in the hope that it would be accepted for use at trial (Under the joint
13 stipulation, the parties may offer witnesses to testify via declaration and, if accepted, the witnesses do
14 not count towards the number of witnesses each party is permitted to call at trial. Thus far, the City
15 has failed to accept a single of the six declarations proffered by Plaintiffs, and as such, it is doubtful
16 whether these limitations set forth in the stipulation will enable a full trial within the time allotted by
17 the Court).

18 C. *Saxena Controls and Forecloses the City’s Motion*

19 The *Saxena* court went on to hold that for “evasive or incomplete discovery responses . . .
20 imposition of an evidence sanction is not one of the remedies.” (*Saxena*, 159 Cal.App.4th at p. 334.)
21 The *Saxena* court reasoned that the Civil Discovery Act (§ 2016.010 et seq.) provides specific
22 remedies for evasive or incomplete discovery responses: a motion to compel. Thus, in the absence of
23 a violation of an order compelling attendance at a deposition, the evidence sanction of exclusion may
24 only be imposed where a party willfully and falsely conceals a witness’ identity. The simple failure to
25 accommodate the City’s schedule, based on its one-sided and unsupported interpretation of the Order,
26 requires it to pursue an order compelling the attendance of said witnesses at deposition at a time it
27 sees fit—otherwise the right to an answer or further answer is waived and an evidence sanction is not
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1 available. (Id.) In fact, the Civil Discovery Act provides the City with the procedural tools with
2 which to compel the witness' attendance at deposition, if it believes that such is necessary. (See Code
3 Civ. P. § 2025.450.) "[T]he burden is on the propounding party to enforce discovery. Otherwise, no
4 penalty attaches either for the responding party's failure to respond or responding inadequately."
5 (Saxena, 159 Cal. App. 4th at p. 334.)

6 Here, the City acknowledged that AFSCME disclosed the witnesses' identities as potential
7 trial witnesses as required by the Court's Order. (Motion, p. 1.) Therefore, it fails to identify any
8 willful and false concealment of the witness' identifies, as is required for exclusion pursuant to
9 Thoren. Because AFSCME provided the City with the Declarations of both Carol Garcia and Peggy
10 Horning outlining their expected trial testimonies, so the City is already aware of not just the witness
11 identities but their anticipated trial testimony obviating any claim of "unfair surprise at trial at trial."
12 (See Soroushian Decl., ¶¶ 2-3, Exh. 1 ("Decl. Carol Garcia"); Exh. 2 ("Decl. of Peggy Horning".) In
13 fact, pursuant to the Order, the City has the additional option of accepting these declarations as trial
14 testimony subject to their objections, filing counter-declarations, and/or cross-examining said
15 witnesses at trial. Given such options, it is disingenuous for the City to cry lack of "basic fairness".

16 Critically, AFSCME has not "refused" to produce either witness for deposition. As the City
17 acknowledges, AFSCME provided several dates on which Ms. Horning was available for deposition.
18 If, after the requisite meet and confer, the City was unsatisfied with the witness availability, it carried
19 the burden of filing motions to compel their attendance at deposition at different times. Ms. Garcia is
20 on a two-week vacation out of the area and simply unavailable to attend a deposition until July 18,
21 when she returns. Plaintiffs have offered to make her available at any time, including weekends, after
22 her return.

23 In light of *Saxena*, this motion in limine is unauthorized by law. Under California law, upon
24 the refusal of the deponent to answer a question, the burden is upon the party seeking discovery to
25 obtain an order from the superior court to compel disclosure. (See *Saxena*, 159 Cal.App.4th at p.
26 334.) The City's attempt to skirt that responsibility, by way of this Motion, is unsupported by law.

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1 D. *There is No Legal Basis to Exclude Witness' Testimony*

2 California law permits a party to move to exclude the "expert opinion of any witness that is
3 offered by any party who has unreasonably failed to ... [m]ake that expert available for a deposition
4" (Code Civ. P. § 2034.300 (emphasis added).) However, the witnesses at issue in this Motion are
5 not experts and will not offer expert opinions at trial. (See Soroushian Decl., ¶¶ 2-3, Exh. 1 ("Decl.
6 Carol Garcia"); Exh. 2 ("Decl. of Peggy Horning"). Moreover, AFSCME has not "unreasonably
7 failed to ... make them available for deposition" AFSCME has continued to offer Ms. Garcia for
8 deposition after she returns from vacation on July 19, 2013, including over the weekend. (See
9 Soroushian Decl., ¶¶ 5-6, Exh. 3 (Letter to Mike Hughes).) Furthermore, as the City acknowledged
10 in its Motion, AFSCME identified several dates for Ms. Horning to appear for deposition; the City
11 appears to reject these overtures on the sole grounds that it believes these dates are too close to trial.
12 However, it cites no authority for the proposition that a witness' availability for deposition in the
13 week prior to trial amounts to an "unreasonable" failure to make that witness available for
14 deposition.³ If anything, this only amounts to a failure to make the witnesses available for deposition
15 at a time that is convenient for the City.

16 The City has failed to identify any analogous authority justifying the exclusion of *lay* witness
17 testimony under these circumstances; in fact, none exists. It must be presumed that the Legislature's
18 failure to provide for such a remedy with respect to lay witness testimony was purposeful when it
19 provided such with respect to expert witness testimony. (Cf. *Pasadena Police Officers Ass'n v.*
20 *Pasadena* (1990) 51 Cal.3d 564, 576.) Therefore, the City fails to demonstrate any grounds for
21 excluding Ms. Garcia or Ms. Horning from testifying at trial.

22 E. *The Court Order Does Not Support the Remedy Sought and AFSCME Has Not Violated It*

23 In a single sentence, the City contends that "AFSCME's refusal to timely produce Ms. Garcia
24 and Ms. Horning violates th[e] ... Order (requiring parties to produce witness "as requested") and is
25 objectionable on that basis as well." The City's one-sentence argument mischaracterizes the Court's
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28 ³ AFSCME, of course, will also be preparing the week before trial. Although defending a deposition the week before trial
takes away from AFSCME's counsel's time to prepare, AFSCME has offered to do so. 7

1 Order and AFSCME's action with respect to it. The Order only requires that AFSCME make
2 witnesses available for deposition when requested to do so by the City; it does not require that
3 AFSCME produce the witnesses for deposition on the date demanded by the City. AFSCME has
4 fulfilled its responsibility under the Order by providing the City with dates on which the witnesses
5 can be deposed. The City's dissatisfaction with witness availability does not constitute a violation of
6 the Order and justify the sanctions sought--which are also not authorized by the Order.

7 **III. CONCLUSION**

8 For the foregoing reasons, the Motion should be denied.
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12 Dated: July 8, 2013

BEESON, TAYER & BODINE, APC.

13 By: Vishtasp Soroushian (by DSN)
14 VISHTASP M. SOROUSHIAN
15 Attorneys for AFSCME LOCAL 101
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

**AFSCME LOCAL 101'S OPPOSITION TO CITY OF SAN JOSE'S SUPPLEMENTAL
MOTION IN LIMINE TO EXCLUDE AFSCME WITNESSES CAROL GARCIA AND
PEGGY HORNING FROM TESTIFYING AT TRIAL**

☒ **By UPS Overnight Delivery** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

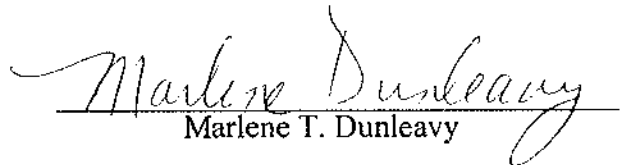
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Attorneys for Defendants, THE CITY OF SAN JOSE AND DEBRA FIGONE

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, July 8, 2013.


Marlene T. Dunleavy

SERVICE LIST

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